Supreme Court, U.S.
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No. 93-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT W. GUTHRIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the purchase of real property, not shown to have a substantial *effect* on interstate commerce, can be the subject of a criminal prosecution under the Sherman Act on the ground that it is "in the *flow* of interstate commerce"?

2. Whether an agreement to suppress bidding at a foreclosure sale is a "contract, combination . . . or conspiracy in restraint of trade or commerce among the several States" where all of the parties to the agreement and to the sale are citizens of the state in which the property is located and the sale occurs?

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OPINIONS BELOW

Neither the memorandum opinion of the court of appeals, Appendix pp. 1a-7a, nor the order denying rehearing, Appx. p. 27a, is reported. The opinion of the district court on post-trial motions, Appx. pp. 8a-26a, is reported at 814 F. Supp. 946 (E.D. Wash. 1993).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1994. Appx. p. 1a. A timely petition for rehearing was denied on March 24, 1994. Appx. p. 27a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a criminal conviction under Section 1 of the Sherman Act, which provides in relevant part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

15 U.S.C. § 1.

STATEMENT OF THE CASE

On two occasions petitioner Robert Guthrie purchased real property at foreclosure sales. At each sale Guthrie paid other parties not to bid; the total amount of the payments in each case was approximately $2000.[1] Guthrie purchased each parcel for $1 more than its "adjusted fair market value" established by the Government, which was well under $35,000 in each instance. After fixing up the abandoned houses on the properties, Guthrie resold them for a profit that the trial court found was less than $5000.

Apparently having nothing better to do, the United States charged Guthrie with two criminal felony violations of the Sherman Act, 15 U.S.C. § 1. It asserted that each of these arrangements constituted a separate "bid-rigging" conspiracy "in restraint of trade or commerce among the several States." The jurisdiction of the district court was based on 18 U.S.C. § 3231.

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[1] Guthrie had heard of this practice from his father-in-law. Before he engaged in it two different lawyers told him that they saw nothing wrong with it. Guthrie made his arrangements at the sales openly, with no effort at concealment. There was no evidence suggesting that he or the other participants believed they were doing anything wrong. Tr. 618-628, 638-640. The trial court ruled that good faith was no defense and granted the Government's motion to prevent Guthrie from presenting evidence that he believed his acts were legal. *See* Appx. pp. 25a-26a.

Although the buyer and the sellers of the property were all residents of Washington state, where the property was located and the sales occurred,[2] the Government asserted that the matter fell within the scope of the Sherman Act because (1) the foreclosures were initiated by out-of-state lenders, who later received a portion of the sale price, and (2) the balance of the indebtedness was insured and paid by the Department of Housing and Urban Development.[3]

At trial Guthrie presented evidence that neither transaction had more than a trivial effect on interstate commerce. Tr. 253-267. In response the Government disavowed its "affecting commerce" theory of jurisdiction in a successful effort to exclude further evidence of the insubstantiality of any effect on commerce. Tr. 267-268, 343, 461. The case proceeded solely on the theory that the alleged conspiracies were "in commerce," or "in the flow of commerce," as the test is sometimes described. *See* Appx. p. 11a.

Over Guthrie's objection, the trial court instructed the jury to find that the necessary connection with interstate commerce existed if the sales constituted an "essential part of [a] foreclosure transaction involving the transfer of funds from the State of Washington to [another state]." Appx. p. 17a. The court further instructed the jury that the magnitude of the commerce restrained was unimportant. *Id.*

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[2] The alleged co-conspirators were also Washington residents, as were the trustees under the deeds of trust.

[3] There was no evidence that Guthrie knew or cared where the lenders were located or which HUD office wrote the checks to pay their claims for the deficiencies. Guthrie paid for the properties with cashier's checks from Washington institutions. The trustees conducting the sales deposited these checks in other Washington institutions, deducted their fees, and wrote new checks to the lenders for the balance.

The jury returned a verdict of guilty on each count. Guthrie was fined and placed on probation. The Ninth Circuit affirmed, ruling that the "movement of money across state lines incidental to a real estate transaction . . . constitute[s] interstate commerce." Appx. p. 6a. Apparently this fact was sufficient, in that court's view, to sweep into "the flow of interstate commerce" all those local players whose participation was a but-for cause of the subsequent interstate movement of funds, and to make irrelevant the Government's failure to prove that Guthrie's activities, allegedly in restraint of trade, had or could have had any substantial effect on interstate commerce. *Id.* Guthrie's petition for rehearing was denied. Appx. p. 27a. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's decisions on when a transaction is "in the flow of interstate commerce" and when a Sherman-Act conspiracy is "in restraint of trade or commerce among the several States."

2. It reflects the continuing confusion in the lower courts over the extent to which the antitrust laws reach activities of a local nature—confusion that was largely created by this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), and that was not resolved by the decision in *Summit Health, Ltd. v. Pinhas*, 114 L.Ed.2d 366 (1991).

3. It demonstrates the trivialization of the Sherman Act against which the four dissenting Justices warned in *Summit Health*.

4. It raises issues similar to those presented by *United States v. Lopez*, No. 93-1260, *cert. granted*, 62 U.S.L.W. 3690 (April 18, 1994), involving the constitutionality of 18 U.S.C. § 922(q), prohibiting possession of firearms at or near schools.

ARGUMENT

A. This Court's Cases on Sherman-Act Jurisdiction Are Themselves in Conflict, Causing Conflict and Confusion in the Lower Courts.

On the one hand this Court has often said that in adopting the Sherman Act, Congress intended to exercise the full extent of its power under the Commerce Clause. *E.g., Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976). On the other hand, in order to decide whether an alleged conspiracy actually meets the statutory test of being "in restraint of trade or commerce among the several States," this Court has analyzed whether the defendant's alleged restraint was "in commerce" or had a "substantial effect on" interstate commerce, in purpose or effect. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980).[4]

Numerous commentators have found these approaches to be inconsistent.[5] Many economic transactions of a type that, in the aggregate, could be regulated by Congress under the Commerce Clause,[6] nevertheless are not themselves "in commerce" and do not individually have a "substantial effect" on such commerce. *E.g.*, Busey &

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[4] The conceptual distinction between activities "in" interstate commerce and those which "affect" interstate commerce has been preserved in the cases . . . . It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory.

McLain, supra, 444 U.S. at 241-242.

[5] *See, e.g.*, Calkins, *The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 Antitrust L.J. 603, 621 n.93 (1992) (Judge Easterbrook characterizes the assertion that the Sherman Act exercises Congress' full powers under the Commerce Clause as "oft-repeated, but ne'er followed").

[6] *See Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942).

Freeman, *The View from the Summit: Jurisdiction and Beyond*, 60 Antitrust L.J. 725 (1992). As four Justices noted in dissent in *Summit Health, Ltd. v. Pinhas*, 114 L.Ed.2d 366, 377-378 (1991), the result of this apparent inconsistency has been confusion and conflict among the circuits.[7]

B. The Holding Below that Local Real Estate Sales Were "In Interstate Commerce" Conflicts with This Court's Decisions.

A classic example of a purely local transaction with at most an insubstantial effect on interstate commerce is an isolated sale of a small parcel of real property. This is particularly clear in this case, where buyers and sellers were all residents of the state where the property is located and the sales were held, although those facts are not critical.[8]

As Guthrie's trial the Government abandoned any effort to prove that Guthrie's activities had a "substantial effect on" interstate commerce. Appx. p. 11a. However the Government argued, and the Ninth Circuit agreed, that they were "in commerce."

The "in commerce" test is "relatively restrictive." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 198

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[7] The resolution of the apparent inconsistency may lie in the distinction between case-by-case determinations under the Sherman Act and situations where Congress has expressly defined a class of persons and activities that affect commerce. This Court has stated that its inquiry "differs significantly" in these two situations. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974). *See* p. 12 below.

[8] "The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all there is here." *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 162 (1907) (Holmes, J.). For the same reason, the fact that the sales in this case were initiated by out-of-state lenders does not make the sales "commerce . . . among the several States."

(1974). In *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), this Court held:

> To be engaged "in commerce" . . . a corporation must *itself* be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.

422 U.S., at 283 (emphasis added). It was not enough in *American Building Maintenance* that the defendant did business with others who were engaged in such commerce.

Similarly, in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), the Court held that to establish Sherman Act jurisdiction a plaintiff must show

> either that *the defendants' activity is itself* in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

444 U.S., at 242 (emphasis added). (The "or" alternative is the "affecting commerce" test, which was concededly not met in this case.)

Since Guthrie's activity was itself local in nature, it was not "in the flow of interstate commerce." It did not become part of interstate commerce by being part of an "interstate foreclosure transaction." Not only is this an inappropriate characterization;[9] such transactions are

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[9] Guthrie was not purchasing "foreclosures"; he was purchasing real estate. The fact that the seller was forced to sell, and the use made of the proceeds of sale, were quite irrelevant to him. From his perspective, this was a real estate transaction, pure and simple.

This is also the correct perspective. "Interstate commerce" is the interstate flow of *goods* and *services*. The use made of the proceeds by the seller has never been thought relevant to the analysis. *Cf. United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974).

themselves not interstate commerce. *See New York ex rel. Hatch v. Reardon, supra* note 8. The decision below conflicts with the holdings of *ABMI* and *McLain*.

C. The Lower Court's Error Was Caused by the Confusion in This Court's Decisions.

The court below felt that the sales were "in commerce" because they were essential to the subsequent interstate flows of funds. Appx. p. 6a. It relied on the characterization of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in *McLain v. Real Estate Board, supra*, 444 U.S. 232 (1980), in support of this proposition. *Id.*, n.1. The Ninth Circuit's error was in part the result of *McLain*'s mischaracterization of *Goldfarb*.

Goldfarb was a class action challenging a state bar's minimum fee schedule for title examinations. The case was tried and decided on the theory that the challenged restraint substantially "affected interstate commerce," specifically interstate real-estate lending and title insurance. *See id.* at 778 n.8, 785.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the Court surprisingly described *Goldfarb* as having been based on the ground "that the activities of the attorneys were *within* the stream of interstate commerce." 444 U.S., at 244 (emphasis added). According to the *McLain* Court, "The *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction . . . ." *Id.*

This statement was simply and undeniably wrong.[10]

The effect of the error in *McLain* was to confuse the distinction between activities "in interstate commerce"

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[10] *E.g.*, "[W]e conclude that interstate commerce has been *sufficiently affected*." *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 785 (emphasis added; footnote omitted). Several other passages from *Goldfarb* could be quoted to establish the same point.

and those that simply "affect commerce." This distinction is important because in the latter class of cases the Sherman Act applies only when the effect on commerce is "substantial." *McLain v. Real Estate Board, supra,* 444 U.S. at 241. Because the court of appeals erroneously treated Guthrie's conduct as "in commerce," it affirmed his conviction despite the Government's failure to show that his local activities had any substantial effect on interstate commerce. This was error, calling for reversal.

D. The *Summit Health* Decision Has Not Solved the Problem.

In *Summit Health, Ltd. v. Pinhas,* 114 L. Ed. 2d 366 (1991), a 5-4 majority of the Court refused to dismiss on the pleadings a case concerning the denial of staff privileges to a single physician at one of a number of competing hospitals in the Greater Los Angeles area. The case continued the confusion whether and when the Sherman Act reaches local activities with insubstantial effects on interstate commerce.

Summit Health produced no rule that can be applied.[11] In lower-court cases involving medical staff privileges, *Summit Health* is simply being cited and the result followed without any attempt to follow or apply the analysis. *E.g., Austin v. McNamara,* 979 F.2d 728, 732 n.1 (9th Cir. 1992); *Oksanen v. Page Memorial Hospital,* 945 F.2d 696 (4th Cir. 1991). In all other types of cases, *Summit Health* is largely being ignored.[12] This Court's intervention continues to be needed to resolve the conflicts caused by *McLain* and to eliminate the confusion in the area generally.

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[11] *See Okusami v. Psychiatric Institute of Washington, Inc.,* 959 F.2d 1062, 1064 (D.C. Cir. 1992) (quoting Calkins, *supra* note 5: *Summit* "is subject to conflicting interpretations, and failed to resolve the tensions and correct the misunderstandings that underlie the interstate commerce requirement").

[12] It was not cited or discussed by the court below, for instance.

This case is an unusually apt candidate for the purpose. Unlike *McLain* and *Summit Health,* it does not arise on the pleadings. The facts are clear, simple, and undisputed. They squarely present the issue.

E. The Decision Below Trivializes the Sherman Act.

The significance of the error below was to federalize and criminalize conduct of a local nature which had at most an insubstantial impact on interstate commerce. The result is the trivialization of the Sherman Act. *See Summit Health Ltd. v. Pinhas,* 114 L.Ed.2d 366, 383-384 (1991) (Scalia, J., dissenting).

This particular case might be viewed as simply an aberrant instance of poor prosecutorial judgment, unlikely to be repeated. However, there is a grave potential for abuse of the Sherman Act in civil cases as well, as Congress has recognized.[13] In many of these cases there is no substantial threat to interstate commerce, and thus nothing implicating the genuine objects of the Sherman Act.

If it is now this Court's view that all economic transactions, including baby-sitting[14] and corner lemonade stands,[15] are sufficiently "in the flow of interstate commerce" that any agreement that restrains them is subject to the Sherman Act, no matter how localized the agreement or how insubstantial the effect on interstate com-

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[13] Concerns about abuse of the antitrust laws in medical peer-review cases were expressly behind the Health Care Quality Improvement Act, for instance. *See* 42 U.S.C. § 11101(4).

[14] "As a matter of practical economics," increased costs of baby-sitting could diminish parents' willingness to go out for meals or entertainment, affecting demand for related goods and services, some of which come from out of state. None of this means that a "conspiracy" by baby-sitters or those who engage them should be a subject of federal criminal prosecution.

[15] Here in Washington state, at least, all lemonade is made with out-of-state lemons.

merce, then the Court should say so. Whatever impact such a ruling would have on the dockets of the lower courts, it would at least resolve the conflicts and save these courts the trouble of parsing out the issue on a case-by-case basis, as this Court has directed be done. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974).

On the other hand, if the Court remains of the view expressed in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-242 (1980), that the Sherman Act prohibition on "restraint of trade or commerce among the several States" means that the defendant's challenged activities must in fact be in or directed at interstate commerce or must have (or be intended to have) a substantial effect on such commerce, then the Court should make this fact clear.[16] Such a course would require reversal of the judgment below, which is inconsistent with this portion of *McLain*.[17]

The Court's intervention would also remedy an injustice to Mr. Guthrie. It was an abuse of prosecutorial discretion for the Government to employ the criminal process in such a trivial matter against someone who so evidently believed that his conduct was not only customary but entirely lawful. *See* note 1 above. "There is no reason for society to attach criminal sanctions or stigmas to men whose actions or intentions were not pro-

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[16] *See* Calkins, *supra* note 5, 60 Antitrust L.J. at 621 n.93, *quoting* former Deputy Solicitor General Easterbrook: "[I]f the Sherman Act exercises less than the whole national power, I hoped [when authorizing the *McLain* brief] the Court would say so and stop the pretense."

[17] There is general agreement that the *McLain* opinion is "singularly confusing." Calkins, *supra* note 5, 60 Antitrust L.J. at 621. The opinion has produced substantial conflicts in the lower courts. *E.g.*, Busey & Freeman, *supra* note 5, 60 Antitrust L.J. at 734; *Summit Health, Ltd. v. Pinhas*, *supra*, 114 L.Ed.2d, at 378-379 (Scalia, J., dissenting).

scribed." II Areeda & Turner, Antitrust Law ¶ 310 (1978).

F. This Case Presents Issues Similar to Those in United States v. Lopez, No. 93-1290, and May Be Affected by the Decision in That Case.

In *United States v. Lopez*, No. 93-1290, *cert. granted*, 62 U.S.L.W. 3690 (April 18, 1994), this Court agreed to consider whether Congress may constitutionally outlaw possession of firearms in the vicinity of a school, without more.

While *Lopez* and Guthrie's case differ in some respects —notably in the specificity with which Lopez's conduct is proscribed by the statute—the cases are similar in others. Congress made no finding in either case that the prohibited activities collectively had a substantial effect on interstate commerce. There was no proof of such an effect on the particular facts of either individual case.

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974), this Court observed:

> The jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation. *Compare United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), *with, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *and Katzenbach v. McClung*, 379 U.S. 294 (1964).

Decision of *Lopez* will presumably require analysis of the scope of Congressional power to proscribe local conduct without first finding an effect on interstate commerce from

the class of similar cases. Whatever the Court says on this subject will likely have a bearing on Guthrie's case.[18]

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the decision in *Lopez*.

Respectfully submitted,

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Dated: June 22, 1994

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[18] In Guthrie's case, however, there is the further issue whether Congress actually did proscribe the conduct in question, and not just whether it could have done so. *See Summit Health, Ltd. v. Pinhas, supra*, 114 L.Ed.2d at 377 (Scalia, J., dissenting).

APPENDIX A

[Filed Feb. 10, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-30066

D.C. No. CR-92 168-01-AAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT W. GUTHRIE,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted December 16, 1993
Seattle, Washington

MEMORANDUM*

Before: BROWNING, NORRIS, and O'SCANNLAIN, Circuit Judges

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* The parties are familiar with the facts and issues and we will not restate them here. This disposition is not appropriate for publication and may not be cited to or for the courts of this circuit except as provided by 9th Cir. R. 36-3.

I

"Whether a jury instruction misstates elements of a statutory crime is a question of law and is reviewed de novo." *United States v. Johnson,* 956 F.2d 197, 199 (9th Cir. 1992). Contrary to Guthrie's contention, the instructions given in this case did not make bid rigging a strict liability crime. They required the government to prove Guthrie knowingly entered into agreements with potential competitors for the purpose of preventing them from bidding on the properties. Such instructions "correctly state[] the government's burden" in a bid rigging case. *United States v. Alston,* 974 F.2d 1206, 1210 (9th Cir. 1992).

The government was not required to prove Guthrie intended to restrain trade. When a per se violation of the Sherman Act is charged, "it [is] not necessary to instruct the jury that it [has] to find that the defendants acted with the purpose of achieving anticompetitive effects or with the knowledge that such effects likely would result." *United States v. Brown,* 936 F.2d 1042, 1046 (9th Cir. 1991), *see also Alston,* 974 F.2d at 1213 ("In a criminal antitrust prosecution, the government need not prove specific intent to produce anticompetitive effects where a per se violation is alleged.").

Brown and *Alston* are not inconsistent with *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978). In *Brown,* this circuit joined six others in holding that the intent required in *Gypsum* is limited to cases involving the rule of reason. Expanding *Gypsum* to cover cases involving per se violations would frustrate the purpose of the per se rule, namely, to prohibit certain practices that almost invariably harm competition and have no redeeming virtue without regard to their actual effect on competition in the particular cases. *Brown,* 936 F.2d at 1046.

Brown did not mischaracterize *Gypsum* as a rule of reason case. *Gypsum* was a rule of reason case. The de-

fendants in *Gypsum* allegedly violated § 1 by exchanging pricing information. As the Court noted:

> The exchange of price data and other information among competitors does not invariably have anti-competitive effects . . . . For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act.

Gypsum, 438 U.S. at 441 n. 16. Although the court noted in *Brown* that the instructions in that case appeared to satisfy the *Gypsum* intent requirement, 936 F.2d at 1046 n. 3, the statements in *Brown* that the *Gypsum* intent requirement is limited to rule of reason cases are not dicta, as Guthrie suggests, but are the primary basis for *Brown's* holding and are cited as such in subsequent Ninth Circuit cases. *Alston*, 974 F.2d at 1213.

The district court here properly instructed the jury "[i]t is not a defense to bid rigging that the defendant may have had good motives or may have thought that what he was doing was legal or that the conspiracy may have had some good results." As the Supreme Court held in *National Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 n. 23 (1984), "good motives will not validate an otherwise anticompetitive practice." We held in *Alston* that the jury instruction Guthrie challenges "is an accurate statement of the law." *Alston*, 974 F.2d at 1210.

A conspiracy may violate the Sherman Act even if not animated by a bad purpose. To sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the government must prove only the degree of criminal intent required for the substantive offense. *United States v. Feola*, 420 U.S. 671, 686-96 (1975). Accordingly, the government was required to prove only that Guthrie conspired to intentionally rig bids.

II

The court considers de novo whether a statute is unconstitutionally vague. *United States v. Hawkins,* 899 F.2d 852 (9th Cir. 1990).

This and other circuits have held that § 1 of the Sherman Act is not unconstitutionally vague as applied to price fixing:

> The indictment charges Miller with price-fixing. Because price-fixing has repeatedly been held to be *per se* illegal under the Sherman Act . . ., Miller could not have had any reasonable doubt that his conduct violated section one. The district court did not err in denying Miller's motion to dismiss the indictment on the ground that section one of the Sherman Act is unconstitutionally vague.

United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985); *see also United States v. Koppers Co., Inc.,* 652 F.2d 290, 294 (2d Cir. 1981) ("In cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.' ") (citation and internal quotation omitted).

The notice concerns that arise when criminal liability is imposed for conduct within the "grey zone" to which the rule of reason applies, *Gypsum,* 438 U.S. at 440-41, are not present when liability is imposed for conduct that is per se illegal. The latter may be punished irrespective of the perpetrator's intent to harm competition, since such punishment will not deter lawful conduct.

Guthrie argues that even if he were charged with notice that bid rigging is per se illegal, he was not on notice that his conduct constituted bid rigging. This kind of ambiguity, however, does not make a statute vague. The jury was instructed that Guthrie could be convicted

only if the jury found beyond a reasonable doubt that Guthrie's conduct actually constituted bid rigging.

III

The district court did not err by refusing to instruct the jury on collusion. The cases cited by Guthrie merely describe the bid rigging in the particular case as having been collusive. They do not hold collusion is an element of a per se violation. Bid riggers often act secretly but their conduct is equally anticompeitive if they openly agree not to compete.

The district court did not err by refusing to instruct the jury on the effect of a seller's acquiescence in bid rigging. The instruction given by the district court required the jury to find that the property was offered for sale through a competitive bidding process. The jury could not have convicted Guthrie if he had negotiated the purchase with the sellers rather than rigged the bidding. *See United States v. Lopez,* 885 F.2d 1428, 2434 (9th Cir. 1989) (holding that district court did not err when it rejected a defendant's proposed instruction since other instructions adequately covered the defense's theory).

Moreover, Guthrie offered no evidence that the banks authorized the trustees to sell the property other than by auction. *United States v. Mason,* 902 F.2d 1434, 1438 (9th Cir. 1990) (holding that a defendant is not entitled to have the court instruct the jury on his theory of the case unless it "has some foundation in the evidence").

IV

A

Guthrie argues the district court erred by instructing the jury it could convict if it found the foreclosure sale was "an essential part of a real estate transaction across state lines." The Supreme Court held in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), that fixing the

price of a service restrains an interstate real estate transaction if the service is an "integral part" of the interstate transaction. *Id.* at 784-85. The terms "essential part" and "integral part" have the same meaning. Both require the jury to find as a matter of fact that the interstate transaction would not have occurred absent the service or event in question. In *Goldfarb*, the service was a title examination; in this case, the event was a foreclosure sale.[1] Thus it was proper for the district court to give the following instruction: "If you find that the [trustee sale] was an essential part of the foreclosure transaction involving the transfer of funds from the State of Washington to [other states], then the interstate commerce requirement would be met . . . ." This instruction was consistent with *Goldfarb* since it required the jury to find the rigged foreclosure sale was an essential part of the interstate movement of funds.

Guthrie also appears to argue that movement of money across state lines incidental to a real estate transaction does not constitute interstate commerce. *Goldfarb* is direct authority to the contrary.

B

There is sufficient evidence to support a conviction if, " 'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Guthrie argues he did not rig bids in interstate commerce, but rather in a local real estate transaction. The

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[1] Although Guthrie suggests *Goldfarb* is an "effect on commerce" case, the Supreme Court has explicitly characterized *Goldfarb* as a case involving a restraint "in the flow of interstate commerce." *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 244 (1980).

evidence supports the jury's conclusion that the rigging occurred in the course of a single continuous interstate transaction. Banks located in South Carolina and Maryland held promissory notes on the two parcels of Washington real estate involved. After the owners of the properties defaulted, the banks initiated foreclosure proceedings by obtaining a "bid-in" price from HUD in Washington, D.C. Since the loans were insured by HUD, the banks were required to enter a minimum bid in the amount of this bid-in price and auction the properties to the highest bidder. The banks hired trustees in Spokane, Washington, to perform these duties on their behalf. The sales price determined at each auction was paid by the purchaser to the trustees in Washington and transferred by the trustees to the banks in South Carolina and Maryland. Thus, the out of state banks initiated the sales after the borrowers defaulted on their loans and conducted the sales through their agents, the trustees, to obtain the highest possible return. Guthrie argues he paid for the property in Spokane by transferring funds to the trustees in Spokane, but the evidence showed the trustees had no right to the funds, and were obligated to and did forward them to the banks in interstate commerce.

Finally, the evidence supports the jury's conclusion that the foreclosure sales were necessary to enable the banks to recover on their loans, and therefore were an essential part of the interstate foreclosure transactions. Though the loans were guaranteed by HUD, the banks were required to foreclose on the properties and complete the sales before filing their claims.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. WASHINGTON

No. CR-92-168-AAM

UNITED STATES OF AMERICA,
Plaintiff,
v.

ROBERT W. GUTHRIE,
Defendant.

Jan. 13, 1993

ORDER DENYING DEFENDANT'S MOTION FOR ACQUITTAL, NEW TRIAL, OR ARREST OF JUDGMENT

McDONALD, District Judge.

Before the court for resolution without oral argument is Defendant's Motion for Judgment of Acquittal, or in the Alternative New Trial or Arrest of Judgment (Ct.Rec. 58). Defendant is represented by retained counsel Leslie Weatherhead. The United States is represented by Phillip Warren and James Sowers of the United States Department of Justice, Antitrust Division. For the reasons stated more fully below, the court is denying defendant's motion.

After trial to a jury in Spokane, Washington, Robert Guthrie was found guilty of two counts of bid rigging in violation of the Sherman Antitrust Act. Guthrie moves this court for a judgment of acquital notwithstanding the verdict, or in the alternative, for either an order in arrest of judgment or for a new trial.

Guthrie's principal arguments are: that the government failed to establish interstate commerce, a substantive and jurisdictional element of a Sherman Act violation; that the jury instructions erroneously directed a verdict against him; that there was a fatal variance between the indictment and the proof at trial; that due process compels his acquittal; and that he was wrongfully denied the opportunity to present exculpatory evidence. The government responds: that the jury found interstate commerce; that the jury instructions properly stated the law on interstate commerce; that there was no variance between the indictment and proof at trial because collusion is not an element of bid rigging; that, as the court ruled in pretrial motions, Guthrie's due process rights were not violated by application of the per se rule; and that the court's ruling on Guthrie's offer of exculpatory evidence was compelled by clear Ninth Circuit authority.

As a preliminary matter, the court notes that several of these issues have been extensively argued before and ruled on by the court, both during pretrial proceedings and throughout the course of the trial.

FACTS:

The vast majority of the facts in this case have never been contested. Evidence admitted at trial established that on two occasions Robert Guthrie attended and participated in the public non-judicial foreclosure sales of real property located in Spokane, Washington. The sales were held in Spokane and were conducted by trustees who were Washington residents. Guthrie himself is a resident of Washington.

At these sales, Guthrie contacted other potential bidders for the properties on which he intended to bid. On both occasions, Guthrie entered into agreements with the other potential bidders that, in return for his payments to them, they would not bid on the properties and he alone would bid. The other bidders accepted Guthrie's pay-

ments on both occasions and thereafter refrained from bidding. Guthrie was the only bidder at both sales, and, submitting bids of $1 above the minimum bid levels, he was also the successful bidder at both sales.

Uncontested evidence established that out of state banks held the notes that were secured by the properties Guthrie purchased. The notes on both properties were guaranteed by the United States Department of Housing and Urban Development. Evidence established that the out of state banks initiated the foreclosure process on the properties, selected the trustees to conduct the foreclosure sales, instructed the trustees on the conduct of the sales, and finally, received the sale proceeds from the trustees after deduction of the trustees' fees.

What the parties did contest at trial was the extent to which Guthrie's activities at these sales were observed by the trustees conducting the sales. They also contested who, as a legal matter, was the rightful owner of the proceeds of the sales. They did not contest, however, the involvement of the out of state banks, or the eventual transfer of funds from the trustees to the banks.

ANALYSIS:

1. *Motion for Acquittal or for Arrest of Judgment: Adequacy of Proof Concerning Interstate Commerce*

Pursuant to Federal Rules of Criminal Procedure 29(c) and 35, Guthrie argues that he is entitled to either a judgment of acquittal notwithstanding the verdict or to an order in arrest of judgment. Ct.Rec. 59 at 3-4. The court shall enter a judgment of acquittal if "the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). The court shall arrest judgment if "the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed.R.Crim.P. 35.

Guthrie argues that the government did not offer sufficient proof at trial to establish interstate commerce, which is both a substantive element for Rule 29 purposes and a jurisdictional element for Rule 35 purposes. He argues that his activities were strictly intrastate and were not in the flow of interstate commerce.

In deciding a Rule 29 motion for acquittal, the court must look to all the evidence, and, when taken in the light most favorable to the government, determine whether "a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir.1992); *see also* Charles Wright, 2 *Federal Practice and Procedure. Criminal*, § 407 (1982).

A Rule 34 motion for arrest of judgment, on the other hand, must be decided on the record alone, that is, on the indictment, plea, and verdict. The evidence is not within the record. Wright, *supra* at vol. 3, § 571. Challenges to the sufficiency of the evidence are not proper under Rule 34. *Id.*

Because the government chose at trial not to argue that Guthrie's activities "affected" interstate commerce, the parties only introduced evidence, and the court only instructed the jury, on what would constitute activities "in the flow of" interstate commerce. Guthrie's post trial motions therefore stand or fall on what must be proven, as a matter of law, to establish that an activity is in the flow of interstate commerce. Much of the parties' argument involves the interpretation of two Supreme Court cases, *Goldfarb v. Virginia State Bar*, 421 U.S. 733, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed. 2d 441 (1980).

Goldfarb concerned the Virginia State Bar Association's price fixing for real estate title searches. The Supreme Court found that interstate commerce was involved even though the title searches themselves were intrastate

transactions. "Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes." *Goldfarb*, 421 U.S. at 785, 95 S.Ct. at 2012.

As Guthrie points out, *Goldfarb* appears on its face to articulate the test for affecting commerce, not the test for what is in the flow of commerce. The Supreme Court, however, considered *Goldfarb* in *McLain* and stated that "[t]he *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction." *McLain*, 444 U.S. at 244, 100 S.Ct. at 510. Rather, jurisdiction was established in *Goldfarb* "on the . . . ground that the activities of the attorneys were within the stream of interstate commerce." *Id.*

Guthrie argues that the *McLain* Court mischaracterized *Goldfarb*, and that it did so in dictum. Guthrie's argument has some appeal. However, for the reasons discussed more fully below, this court believes that it is bound by *McLain* and that *McLain* compels a decision against Guthrie on the interstate commerce issue.

First, with respect to whether or not *McLain*'s characterization of *Goldfarb* is dictum; as this court reads *McLain*, it is essential to the Supreme Court's holding that *Goldfarb* not be the controlling test. *McLain* was indisputably an "affecting commerce" case. Both the district court and the court of appeals had decided the case under their interpretation of the *Goldfarb* rule. The Supreme Court did not question that, if *Goldfarb* applied, jurisdiction would not lie. Instead, they squarely confronted *Goldfarb* and characterized it as an expression of the "stream of commerce" test. The characterization is therefore not mere dicta, but rather necessary to their holding that jurisdiction existed in *McLain*.

Second, as to Guthrie's argument that *McLain* is a mischaracterization of *Goldfarb*, the *McLain* Court did not simply say that *Goldfarb* was a stream of commerce

case and leave it at that. Instead, they described *Goldfarb*'s reasoning.

> Since the financing depended on a valid and insured title we concluded that title examination was "an integral part" of the interstate transaction of obtaining financing for the purchase of residential property and, because of the "inseparability" of the attorneys' services from the title examination process, we held that the legal services were in turn an "integral part of an interstate transaction."

McLain, 444 U.S. at 244, 100 S.Ct. at 510. This description of *Goldfarb*'s reasoning provides this court with a workable standard for what is in the flow of commerce. In Guthrie's case, if the foreclosure sale was an integral part of an interstate foreclosure transaction, and if Guthrie's activity was an inseparable part of the foreclosure sale, then his activity would be an integral part of an interstate transaction, and therefore in the flow of interstate commerce. Because *McLain* provides a facially reasonable reading of *Goldfarb*, and because that reading appears essential to *McLain*'s holding, this court accepts *McLain*'s characterization of *Goldfarb*.

The government argues that the *Goldfarb* test, as construed by *McLain*, is precisely what the jury was instructed they had to find in order to return a verdict of guilty. It argues that the prosecution established, and the jury found, that the rigged sales were an essential part of the foreclosure transactions that involved out of state banks. The strong, and essentially uncontested, evidence on this issue concerned the role the out of state banks played in initiating, directing, and concluding the loan foreclosures, which included the sales of the properties that Guthrie purchased. The court therefore finds that, taken in the light most favorable to the government, this evidence is more than sufficient to allow a rational juror to conclude, beyond a reasonable doubt, that Guth-

rie's activities were an integral part of the interstate foreclosure transactions.

Guthrie makes two arguments as to why such proof is insufficient even under *Goldfarb*. First, he argues that, unlike the price fixing in *Goldfarb*, Guthrie's restraint was not market-wide, affecting all foreclosure sales in Washington, instead, it only affected those few sales at issue. While this is true, it is arguable that *Goldfarb* required market-wide activity, that is, required that the attorneys' services be an inseparable part of title searching, because there were no specific interstate transactions at issue. *See Goldfarb*, 421 U.S. at 775-78, 95 S.Ct. at 2007-08. Therefore, the Court could only find that the restrained activities were an integral part of some interstate transactions not specifically involved in the case by inference, and it could only so infer because state law required attorneys to perform all title searches and because the price fixing involved all attorneys in the state. This is distinguishable from the case at bar where there were in fact specific interstate transactions and the question put to the jury was whether the rigged sales were an essential part of those specific transactions.

Guthrie's second argument is essentially that the foreclosure transactions were not themselves a form of interstate commerce. He argues that the interstate commerce at issue was the original loan transactions, in which Guthrie played no part. Because the foreclosure sales were not an essential part of the loan transactions, Guthrie argues, his activity did not restrain an essential part of the interstate commerce in loans. He argues that, because people don't buy or sell "foreclosures" in interstate commerce, foreclosure transactions are not, as a matter of practical economic reality, recognized as interstate commerce.

The court finds this argument to be without merit. The parties introduced evidence and the jury was instructed on whether the foreclosure transactions constituted inter-

state commerce. The jury was specifically instructed that interstate commerce is "the transaction of business across a state line or the movement of goods or money across a state line in the course of business transactions." Inst. 17. They were further instructed that:

> Funds in interstate commerce are considered in commerce until they reach the point where their movement is intended to end. A temporary pause in their transit does not necessarily mean that the funds are no longer in commerce—where there is a practical continuity of movement, funds remain in commerce until they reach their final destination.

Id. There was substantial, uncontested, evidence that the funds Guthrie tendered to the trustees at the foreclosure sales eventually made their way across state lines to the out of state banks. Guthrie argued to the jury that the transaction was entirely complete when he tendered funds to the trustees. This court finds, however, that when the evidence is taken in the light most favorable to the government, it is undeniable that a rational juror could have found, beyond a reasonable doubt, that there was a practical continuity of movement of the funds across state lines to the out of state banks.[1]

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[1] Guthrie's argument based on *Domination Parking Corp. v. Baltimore & Ohio R.R.*, 450 F.Supp. 441 (E.D.Va.1978) does not compel a different conclusion. The business allegedly restrained in *Dominion Parking* was that of providing parking spaces. The court found that the actual business of renting parking spaces was overwhelmingly local and therefore not in interstate commerce. The court also found that the parking lot operator's purchase of supplies from out of state, and their payment of rent to an out of state landlord, did not put them in the flow of interstate commerce.

Dominion Parking's finding on interstate transfer of documents is, however, distinguishable from the case at bar. In *Dominion Parking* the allegedly restrained intrastate business bore no relation to the out of state transactions. Here, however, the government's evidence concerning the initiation and execution of the

Because the court believes that *Goldfarb*, as constructed by *McLain*, controls the question of interstate commerce, it finds the evidence more than adequate to allow a rational juror to have found, beyond a reasonable doubt, that Guthrie's activities were in the flow of interstate commerce. Accordingly, the court denies Guthrie's motion under Rule 29. The court also denies his motion under Rule 34 as, under the same *Goldfarb* analysis, the indictment and the verdict sufficiently establish the jurisdictional issue of interstate commerce.

2. *Motion for New Trial: Jury Instruction On Interstate Commerce*

Guthrie argues that the court erroneously instructed the jury on the interstate commerce element. Ct.Rec. 59 at 4-7. He therefore requests a new trial pursuant to Federal Rule of Criminal Procedure 33. Rule 33 allows the court to grant a new trial where the interests of justice so require. A district court can grant a new trial to cure improper instructions. *See* Charles Wright, 3 *Federal Practice and Procedure: Criminal*, § 556 (1982).

Guthrie makes several arguments concerning the errors of the court's instruction. The propriety of a court's instruction can not be determined by examining any single paragraph, phrase or word in isolation. Wright, *supra* at vol. 2, § 485. Accordingly, the court's full interstate commerce instruction is set out below.

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loan foreclosures, including the sales in which Guthrie participated, is more than sufficient for a rational juror to conclude that the alleged restraint involved an essential part of those interstate transactions. Accordingly, the fact that *Dominion Parking* found interstate transfer of documents, standing alone, insufficient to put the defendant in interstate commerce, does not compel the conclusion Guthrie urges, that the interstate transfer of documents and funds in this case was therefore necessarily outside of the flow of commerce.

Instruction No. 17

Another of the elements charged in the Indictment is that the alleged conspiracy was in restraint of interstate commerce. Interstate commerce means, simply, the transaction of business across a state line or the movement of goods or money across a state line in the course of business transactions.

The government can demonstrate a restraint on trade if it can show that the conspiracy directly involves goods or transactions moving across state lines. If the government proves only an indirect or incidental relationship between an agreement to restrain trade and interstate commerce, you must find the defendant not guilty.

Funds in interstate commerce are considered in commerce until they reach the point where their movement is intended to end. A temporary pause in their transit does not necessarily mean that the funds are no longer in commerce—where there is a practical continuity of movement, funds remain in commerce until they reach their final destination.

While real estate remains physically in one state, transactions related to real estate can be in the flow of interstate commerce. To decide whether the alleged conspiracy was "in the flow" of interstate commerce, you must determine whether the activities of the alleged conspiracy restrained an essential part of a real estate transaction across state lines. When the alleged conspiracy occurs within the flow of interstate commerce, the magnitude of the commerce restrained is unimportant.

If you find that the November 17, 1989 sale of the property located at West 3514 Walton Avenue was an essential part of the foreclosure transaction involving the transfer of funds from the State of Washington to South Carolina, then the interstate commerce requirement would be met for Count 1.

> If you find that the April 6, 1990 sale of the property located at 3204 E. 24th Avenue, was an essential part of the foreclosure transaction involving the transfer of funds from the State of Washington to Maryland, then the interstate commerce requirement would be met for Count 2.
>
> It is a question of fact for you to determine whether the alleged conspiracy was in restraint of interstate commerce. In this regard, interstate commerce is not a technical legal question, but a practical one based upon the facts establishing the manner in which business operates.

Guthrie's first argument is that the instruction allowed the jurors to find interstate commerce without any reference to a "directness" or "continuity" test. He concedes that the second paragraph required a finding of not guilty if Guthrie's activities were only indirectly or incidentally related to interstate commerce. However, he argues that the latter part of the instruction, by not restating the second paragraph's caveats, contradicted the second paragraph and allowed the government to shift the juror's focus away from the second paragraph.

The government responds that the second paragraph carries as much weight as the latter paragraphs and that the instruction as a whole was consistent with the second paragraph. As to the first contention, the court notes that instruction 1 informed the jury that the order in which the instructions was given had no significance as to their importance. It further instructed the jurors that the attorneys might highlight specific portions of the instructions but that the jury should "consider the instructions as a whole and should not place any undue emphasis on any particular instructions or part thereof." Accordingly, the government was well within its rights to focus the jurors' attention on any portion of the instructions it pleased. That right in no way affects the propriety of the instruction as a whole.

With regard to Guthrie's contention that the instruction was internally inconsistent, the court could arguably hold that requiring the jury to find Guthrie's activities an essential part of an interstate real estate transaction was not, strictly speaking, identical to requiring them to find that his activities were directly and not merely incidentally related to interstate commerce. Such a holding, however, would entail semantic hair-splitting. Accordingly, the court rejects Guthrie's argument that the instruction was internally inconsistent.

Guthrie's second argument is that the instruction improperly adopted the government's position as to how the transaction should be viewed. He argues that paragraphs five and six, by calling the jurors' attention to the foreclosure transaction, rather than to Guthrie's activities, constituted a comment on the evidence. He further argues that it "put the focus on the transaction all witnesses agreed did not involve Guthrie." Ct.Rec. 59 at 6.

The government contends that the character of the instruction was wholly consistent with *Goldfarb*. It argues that the *Goldfarb* Court necessarily considered the larger transaction of which the challenged, and admittedly wholly intrastate, activity was a part. Such an analysis is central to *Goldfarb*. Under *Goldfarb*, the only way a local activity can ever be in the flow of interstate commerce is if it is an integral part of larger transactions that are in interstate commerce. Accordingly, the court finds that its instruction was wholly consistent with *Goldfarb*.

It is also within the court's power to draw the juror's attention to the facts it thinks important in the case. Charles Wright, 2 *Federal Practice and Procedure: Criminal*, § 488 (1982). As long as the jury is instructed that they are the sole judges of the facts, such comment is acceptable where the judge believes it will be helpful to the jury and where the jury is instructed that they are the sole judges of the facts. *Id.* Instruction 1 included the

charge in the jury that: "Nothing the court has to say in these instructions is to be taken as an indication that it has any opinion about the facts of the case, or what that opinion is. It is not the court's function to determine the facts, but rather yours." Instruction 17 concluded by reminding the jurors that: "It is a question of fact for you to determine whether the alleged conspiracy was in restraint of intertsate commerce."

Given the importance of the interstate commerce question to this case, the court believes that directing the jurors' attention to the relevant transactions, as determined by *Goldfarb*, was helpful to their deliberations. To the extent that this constituted a comment on the evidence, it was well within the court's power and instructions 1 and 17 properly reminded the jury that no such comment relieved them of their sole responsibility to determine interstate commerce as a question of fact. Accordingly, this court finds that Guthrie's objection to paragraphs five and six is without merit.

Guthrie next argues that instruction 17 blurred the distinction between "in the flow of" and "affecting" interstate commerce. He argues that, by not requiring the jury to find a direct, non-incidental relationship between Guthrie and an out of state party, the instruction did not in fact require them to find that Guthrie's activities were in the flow of interstate commerce.

The government responds that, again following *Goldfarb*, there is no requirement that Guthrie himself have had a direct, non-incidental relationship to an out of state party. According to the government, the critical inquiry is whether the local activity was integral to interstate transactions. The court's instruction requiring the jury to find that "the activities of the alleged conspiracy restrained an essential part of a real estate transaction across state lines" seems wholly consistent with *Goldfarb*, as discussed in part 1 above.

Finally, Guthrie argues that the instruction amounted to a directed verdict, as it told the jury its verdict should turn on an undisputed fact. He alleges that there was no challenge to the fact that the sale was related to the foreclosure. Such a relationship, he argues, is not the same as asking whether Guthrie's purchase of the properties put him in interstate commerce.

The government responds that the instructions required the jury to find more than a mere relationship between the sales and the foreclosures. As noted above, paragraph four of the instruction required the jury to find that the alleged conspiracy restrained an essential part of a real estate transaction across state lines. As discussed in part 1 above, Guthrie's implied contention that the foreclosure transactions were not themselves transactions in interstate commerce is without merit. Accordingly, requiring the jury to find that the conspiracy restrained an essential part of those transactions comports with *Goldfarb* and is a proper instruction.

This court finds that none of Guthrie's challenges to instruction 17 survive comparison to *Goldfarb*. Because, as discussed above, this court believes that *Goldfarb* controls the court's consideration of this case, and because the court's instruction is proper under *Goldfarb,* the court denies Guthrie's motion for a new trial based on his challenge to instruction 17.

3. *Motion for Acquittal: Indictment and Proof at Trial (Collusion as Element of Bid Rigging)*

Guthrie argues that the court should acquit him due to the court's refusal to instruct that collusion is an element of bid rigging. Cl.Rec. 59 at 7-8. The grand jury indicted Guthrie for bid rigging. Ct.Rec. 1. Guthrie believes collusion is a distinct element of bid rigging. Accordingly, he argues that the court's refusal to so instruct allowed the petit jurors to find guilt without finding an element of the crime charged in the indictment and that therefore

the court must acquit for insufficiency of the evidence on an essential element.

It is unclear whether this motion might more properly have been brought as a motion for a new trial based on improper instruction. In either case, however, the question turns on the sufficiency of the court's instructions.

The court's instructions on bid rigging read as follows:

Instruction No. 14

> The Indictment charges the defendant with bid rigging. Bid rigging is an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids. Bid rigging may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding: or any other agreement with respect to bidding that affects, limits, or avoids competition among them.
>
> Every conspiracy to rig bids is unlawful, regardless of the motives of the parties or any economic justification.
>
> The aim and result of every bid rigging agreement, if successful, is the elimination of one form of competition.
>
> Thus, if you determine that the defendant and at least one other person reached an agreement as to whom [*sic*] would refrain from bidding at a foreclosure sale, bid rigging has been established.
>
> In considering the evidence, you should determine first whether there was a conspiracy to rig bids as charged in the Indictment and then whether the defendant knowingly became a member of that conspiracy.

Instruction No. 16

> Under the Sherman Act, bid rigging is per se illegal. If you find there was a conspiracy to rig foreclosure sales bids, it does not matter why the bids were rigged or whether the sales price was too high or low; reasonable or unreasonable; fair or unfair. It is not a defense to bid rigging that the defendant may have had good motives, or may have thought that what he was doing was legal, or that the conspiracy may have had *some* good results. You may not consider any justification for rigging the sales bids.

The government responds that instruction 14 is nearly identical to the ABA's bid rigging instruction from *Sample Jury Instructions in Criminal Antitrust Cases* (1984), and that it is routinely used in bid rigging cases. They further contend that it is an accurate statement of the law on bid rigging, that is, that the evil of bid rigging is the agreement to limit competition in bidding, not the manner in which the agreement is made.

The government also cites several cases concerning the per se nature of bid rigging in support of its argument that collusion is not a distinct element of bid-rigging. Ct.Rec. 60 at 7-8. Guthrie points out in his reply brief that all of these cases, at one time or another, use the word collusion, or note that it was involved. Some of them even include the term in indictments or jury instructions on bid rigging. Ct.Rec. 61 at 7-8. While Guthrie's observation is certainly correct, the inference he draws from it, that collusion is therefore a necessary element of bid rigging, is not so clear. Logic does not require, and none of the cases state, that because most bid rigging involves collusion, collusion is therefore a necessary element of bid rigging.

There is a tendency in these cases to use phrases like "collusive, non-competitive, and rigged bids." *See, e.g., United States v. MMR Corp. (LA)*, 907 F.2d 489, 494

(5th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1388, 113 L.Ed.2d 445 (1991); *United States v. Koppers Co.*, 652 F.2d 290, 295 (2d Cir.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981). The court believes it is reasonable to read these phrases, not as an indication of three separate elements of bid rigging, but rather as a variety of ways of describing the same thing. Accordingly, the court finds that its instruction 14, specifically the first paragraph, which is identical to the ABA's sample jury instruction on bid rigging, adequately defines bid rigging as "an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids."

The issue of collusion as an element of bid rigging was previously argued at trial. Transcript at 411-27. At that time, the court found that its action was controlled by the recent Ninth Circuit opinion in *United States v. Alston*, 974 F.2d 1206 (9th Cir.1992). The court noted that the *Alston* instruction on per se violations of the Sherman Act excluded, as a matter of law, several defenses, including the defendant's belief that what he was doing was legal. The court construed Guthrie's collusion argument as an attempt to introduce evidence on the defenses that *Alston* held were unavailable.

Guthrie argued that he was attempting to offer evidence of collusion not in relation to such defenses, but rather in relation to his theory that collusion is a distinct element of bid rigging. When the court noted that *Alston* involved no collusion, Guthrie responded that *Alston* concerned price fixing and not bid rigging. The court stated its opinion that bid rigging is nothing more than a form of price fixing and that the critical inquiry concerns the agreement to restrain bidding, not the manner in which the agreement is carried out. *See United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970) (agreement to rig bids "is a price fixing agree-

ment of the simplest kind, and price fixing agreements are per se violations of the Sherman Act.").

Given the court's reading of the cited cases on bid rigging, and given the court's reasoning in its prior ruling on the admissibility of collusion evidence, the court continues to believe that its definition of bid rigging, identical to the ABA's definition, is correct. Under the court's definition of bid rigging, as an agreement to interfere with competition for a transaction conducted by bid, the court finds that there was ample uncontested evidence from which a rational juror could find, beyond a reasonable doubt, that Guthrie entered into such agreements. Accordingly, the court denies Guthrie's motion for acquittal based on the elements of bid rigging.

4. *Motion for Acquittal or for New Trial: Due Process and Application of the Per Se Rule to Bid Rigging*

Guthrie renews his plea for acquittal on due process grounds arguing that the government's application of the per se rule to his activities violates his due process rights. Ct. Rec. 59 at 8-10. With the exception of the court's trial rulings excluding Guthrie's offers of exculpatory evidence, Guthrie offers no new argument on the due process issue; he merely renews his earlier motion.

The court ruled on Guthrie's due process argument at the pretrial conference and heard further discussion on the issue on the morning of trial. Because neither party provides any new argument or authority on the issue the court denies Guthrie's motion for the reasons expressed in its prior rulings.

In the alternative, Guthrie requests a new trial in which he could present exculpatory evidence. He argues that the Sherman Act does not impose strict liability and that therefore he must be allowed to introduce evidence of his belief that his actions were legal.

The government responds that this court's exclusion of such evidence was clearly in line with the Ninth Circuit's

Alston decision. *Alston*'s instruction 10, which the circuit specifically approved as a correct statement of the law, clearly stated that, as a matter of law, neither good motives nor a belief that one's activities are legal are available defenses to charges of per se Sherman Act violations. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir.1992). Because this court has repeatedly found that *Alston* compels exclusion of Guthrie's exculpatory evidence, it denies his motion for a new trial based on his claimed right to introduce such evidence.

For the reasons discussed above, IT IS HEREBY ORDERED that defendant's motion for judgment of acquittal, or in the alternative for new trial or for arrest of judgment is DENIED.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

APPENDIX C

[Filed Mar. 24, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-30066

D.C. No. CR-92-168-01-AAM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT W. GUTHRIE,
Defendant-Appellant.

ORDER

Before: BROWNING, NORRIS, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

No. 93-2047

In The

Supreme Court of the United States

October Term, 1994

ROBERT W. GUTHRIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a national organization[1] whose membership is comprised of more than 8,000 lawyers and 20,000 affiliate members who are citizens of every state. Members serve in positions that bring them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. NACDL is dedicated to the preservation and improvement of our adversary system of justice.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. The recent (and apparently increasing) attempts at expansion of federal power to define as criminal certain conduct which has traditionally been within the sole purview of state power, and which bears no clear relation to the defined powers of the federal government, presents a question of compelling importance to NACDL. For these reasons NACDL is honored to offer itself as *amicus curiae*

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[1] NACDL is organized under the laws of the District of Columbia. It was founded in Houston, Texas, in 1958. In 1984 NACDL moved its offices to Washington, D.C., where it is currently headquartered. Its members come from every state in the United States, as well as Puerto Rico, the Virgin Islands, Guam, and several foreign countries.

and to urge the Court to grant *certiorari* to address the highly significant question presented by Petitioner.

Pursuant to the Supreme Court Rules, Amicus has submitted the written consents of both Petitioner Guthrie and the Solicitor General.

II.

SUMMARY OF ARGUMENT

NACDL believes the writ should be granted because this case presents a question concerning the scope of federal power to define and prosecute crimes which is of exceptional public importance. The most significant and earnest constitutional dispute of our time is the dispute surrounding the exertion of "federal police power," under the aegis of the Commerce Clause, over local activity traditionally regulated by the criminal law of the states. That debate will intensify, and this Court will be confronted with further, related questions as Congress continues to expand federal criminal power.

The case is complementary to *United States v. Lopez*, No. 93-1290, in that it presents a slightly different aspect of the question of the limits of the federal commerce power presented in *Lopez*, and does so on a clear, uncluttered record in the context of the Sherman Act,[2] one of the oldest and oft-construed statutes creating a federal crime under the commerce power. The description of the limits of the commerce power is a proper judicial function. This Court should grant certiorari in this case to

[2] 15 U.S.C. § 1.

retain and clarify the traditional limitations on the reach of the Sherman Act and the commerce power.

III.

ARGUMENT

A. THE EXPANSION OF FEDERAL POWER POSES A QUESTION OF GREAT PUBLIC SIGNIFICANCE: IT HAS PROMPTED A CRISIS IN THE FEDERAL COURTS, DRAWN CRITICISM FROM STATE AUTHORITIES, AND LAUNCHED A NATIONAL DEBATE AMID PUBLIC WORRY ABOUT AN EXCESS OF FEDERAL POWER.

Concerns about the expansion of federal power in general, and about the particular federal power to define and prosecute crimes, give rise to one of the most significant constitutional debates of our time. The growth of the federal prosecutive apparatus has been held squarely responsible for the current crisis in the federal courts.[3]

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[3] The Federal Courts Study Committee, a Committee of lawyers, state and federal judges and members of Congress charged by Congress to study and report on the federal courts, found:

> At first almost all the nation's judicial business was handled by state courts; there were few federal judges and their jurisdiction was highly circumscribed. Even today, 90 percent of the nation's judicial business is handled by state rather than federal courts. With the expansion of the federal government – an expansion inaugurated by the Civil War, accelerated by prohibition and then by the New Deal, and accelerated further during the burst of federal lawmaking that began with President Johnson's "Great Society" programs

Federal judges have called for vast increases in the size of the judiciary,[4] arguing that without such growth the courts cannot do their jobs. Others worry about the ill effects of such growth on the federal courts as an institution.[5]

The Judicial Conference of the United States and various federal circuit judicial conferences have issued resolutions expressing worries about the effect of the expansion of federal criminal jurisdiction upon the very basis of federalism. In 1991, the United States Judicial

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> and has continued unabated ever since – the federal courts were bound to grow, both absolutely and relatively to the state courts. And grow they did. But until the 1950s growth was extremely gradual (except for a blip during Prohibition) and was easily accommodated . . .
>
> Through . . . various expedients . . . the federal courts had, until a year ago, managed to keep abreast of their dockets, though with some cost in the quality of federal justice . . .
>
> The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing judges in larger metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts . . . is at last upon us.

Report of the Federal Courts Study Committee, April 2, 1990, at 4-5 (parenthetical in original).

[4] *See, e.g.*, Stephen Rheinhardt, *Too Few Judges, Too Many Cases*, ABA Journal, Jan. 1993, at 52.

[5] *See, e.g.*, Gerald B. Tjoflat, *More Judges, Less Justice*, ABA Journal, Jul. 1993, at 70.

Conference opposed a proposed law which would define as a federal crime violent felonies involving handguns. The Conference said "[s]uch expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism and would ignore the boundaries between appropriate state and federal action."[6] The Ninth Circuit Judicial Conference declared in 1993 that:

> The increasing federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden on the much smaller federal court system to handle expanding criminal dockets.[7]

The federal courts, which bear much of the brunt of the changes brought by the expansion of federal power to prosecute crime, may have special reason to complain. But they are not alone in their criticisms of or concerns about federalism. The Conference of Chief Justices, which is "composed of the highest judicial offices of the 56 state, territorial and commonwealth court systems and the District of Columbia"[8] adopted a resolution prompted by the Senate's recent crime bill which said the Conference:

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[6] Judicial Conference of the United States, *Federalization of State Prosecutions, Position of the Judicial Conference of the United States* (Sept. 20, 1991). Appendix 7.

[7] Ninth Circuit Judicial Conference, *Memorandum No. 4* (August 1993). *See* Appendix 1.

[8] Letter of Chief Justice Jean Turnage to Hon. Edward M. Kennedy, February 28, 1994. *See* Appendix 4.

- Strongly believes that the prosecution of crime in our nation must be addressed in a meaningful way to provide resources and reinforcement for the efforts of state judicial, legislative, and executive leaders to address the problem of crime in their jurisdictions; [and]
- Strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing state criminal law and procedure . . . [9]

In 1980, a meeting of the National Governors' Association was attended by considerable criticism of the disproportionate power of the federal government (as Governor Lee Dreyfus of Wisconsin delightfully phrased the governors' complaint, "[t]he 'pluribus' is getting lost in the 'unum' ").[10] More recently, the National Governors' Association registered its concerns "that some attempts to expand federal criminal law into traditional state functions . . . could undermine state and local anti-crime efforts," and "urge[d] legislators to pursue policies that recognize rather than erode the states' role on the chief planners and administrators of criminal justice programs."[11]

In May 1987, 39% of Americans polled in a CBS/New York Times poll said the federal government had "too

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[9] Conference of Chief Justices, *Resolution IX* (Feb. 10, 1994). Appendix 10.

[10] Robert L. Turner, Boston Globe (Editorial) Aug. 8, 1980 (WESTLAW, Papers database).

[11] National Governors' Association, *HR-25 Policy* (July 1994). Appendix 13.

much power."[12] In June 1989, 61% of Americans thought the federal government had "too much power."[13]

These sentiments were focused by the crime bills recently passed by the House[14] and Senate[15] (a conference committee is presently at work to reconcile them). In addition to the resolutions quoted above, there has been a number of editorials and letters in the legal[16] and, to some extent, the popular[17] press.

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[12] CBS News/New York Times Poll, May 25, 1987. Appendix 9.

[13] Gallup Poll, Jun. 10, 1989. Appendix 8.

[14] H.R. 3355, 103d Cong., 2d Sess. (1994).

[15] S.B. 1607, 103d Cong., 2d Sess. (1994).

[16] *See, e.g., National Law Journal,* Podium, Nov. 8, 1993, and Letters, *National Law Journal,* December 27, 1993 ("Everyone knows that the Founders were extremely worried about the potential dangers of standing armies. They would have been no less worried about a national police force . . . "); January 17, 1994 ("Absent a specific state request for assistance [from a state legislature under Act IV sec.4] Congress has no power to punish domestic violence *per se* . . . "); April 19, 1994 ("our . . . leaders . . . are now furiously engaged in constructing an unprecedented national police machinery to be loosed on the public . . . "). *See also* Jim R. Carrigan and Jessica Bolger Lee, *Criminalizing the Federal Courts,* Trial (magazine), June 1994, at 50.

[17] *See, e.g., Perspective,* Atlanta Constitution, January 30, 1994:

> Supporters say the federal laws are needed to help stem the tide of crime and provide more resources for enforcement and incarceration to budget-strapped state governments.
>
> But critics charge that recent congressional actions are part of a continuing and dangerous trend to "federalize" whole new categories of crime. In their zeal to be

B. THIS CASE IS COMPLEMENTARY TO UNITED STATES V. LOPEZ, TOGETHER WITH WHICH IT FORMS A LOGICAL STARTING POINT FOR THE MODERN APPLICATION OF THE COMMERCE CLAUSE.

This Court summarized the commerce power in *Perez v. United States.*[18] The Court said the "Commerce Clause reaches, in the main, three categories of problems." Congress can regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities affecting commerce.[19]

Within the "affecting commerce" category, the Court identified two historical applications which describe the logical limits of the power: (a) Congress defines certain activities which may affect commerce, leaving it "to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act."[20] The Court has forged two tests to gauge whether the requisite effect on commerce has been shown: (i)

> seen as tough crime fighters, critics say, members of Congress have crossed the line – usurping the authority of the states to determine what is legal within their borders, duplicating laws already on state books, and blurring the distinction between the role of the federal government and that of the states.

See also Judge Carrigan's Warning the Issue: A Federal Judge Warns Against "Criminalizing the Federal Courts" – Our View: This Concern is Fully Justified, Rocky Mountain News (Editorial) March 8, 1994 (WESTLAW, Papers database).

[18] 402 U.S. 146 (1971).

[19] *Id.* at 150.

[20] *United States v. Darby,* 312 U.S. 100, 120-21 (1941).

whether the individual was "in the flow" of commerce, and (ii) whether there was a "not insubstantial effect on commerce." Alternatively, (b) Congress defines certain local conduct as having, in the aggregate, an effect on interstate commerce, as in *Perez;* the courts' only role is to determine whether the conduct in question fits Congress' description.[21]

This Court recently granted *certiorari* in *United States v. Lopez,* No. 93-1260 (April 18, 1994). *Lopez* appears to present the question whether Congress can regulate local conduct without making an explicit choice either to require proof of an effect on commerce in the individual case ("3(a)" above), or to define local conduct as having an aggregate effect ("3(b)", above), and, assuming it may, whether a court must imply a requirement to show an actual effect on commerce, as in "3(a)", above.

The *Guthrie* case presents a related issue: When Congress decides to control only conduct which a court can find affects interstate commerce, "as in the Sherman Act" ("3(a)" above), and where there is no proof (or any assertion) of any substantial effect on interstate commerce resulting from the local activities, does some later movement of funds over state lines subject the earlier conduct to federal regulation?

It is clear, given the intensity of the public debate and the direction of pending legislation,[22] that the lower

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[21] *Id.*

[22] The House, for example, has passed H.R. 3355, which is now under consideration by a conference committee seeking to reconcile it with a different Senate bill. If Title XIX of H.R. 3355 becomes law, this Court will doubtless be asked to decide

courts are going to be called upon soon to apply the "effects" and "flow" limitations on the Commerce Clause in new contexts. It is meet that the Court should furnish the lower courts with clear guidance created in the context not only of the new, untested legislation presenting a question under "3(b)" of the *Perez-Darby* formula, as in *Lopez*, but also, at the same time, with reference to the century-old, oft-construed Sherman Act (which falls under "3(a)", above). The *Guthrie* case presents that opportunity on a factual record which is clear, simple, and as the district court remarked,[23] virtually undisputed.

C. THE LIMITS OF THE COMMERCE POWER MUST BE SET BY THE COURT, NOT THE CONGRESS.

It has long been understood that Congress may oust, duplicate, or otherwise offend state power, if need be, in the exercise of its commerce power.[24] But it has never been held that federal power under the Commerce Clause

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whether federal authorities have power to prosecute juveniles possessing handguns (and if they do, whether individual proof of "flow" or "substantial effects" is required), based upon Congress' declaration, *inter alia*, that:

> Inasmuch as illicit drug activity and related violent crime overflow state lines and national boundaries, the Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to combat these problems.

1994 *Cong. Rec.* 2684 (April 25, 1994).

[23] *United States v. Guthrie*, 814 F.Supp. 942, 943 (E.D. Wash. 1993). Pet.App. at 8a.

[24] The *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

is utterly without limits. On the contrary, it has always been described as a limited power:

> [The] express grant of power to regulate commerce among the states has always been understood as limited by its terms and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.[25]

Plainly, were the commerce power unlimited, two hundred years of argument and precedent about its scope would have been superfluous, as would the Tenth Amendment itself. As to the latter, it bears noting that while the Tenth Amendment may be a mere "truism" describing, as the obverse of the powers granted to the national government, the residuum of power left to the states, it nonetheless must mean *something*. It is robbed entirely of its meaning if the constitutional power of the federal government is declared to be unlimited.[26]

The problem of interference with legitimate state interests in violation of the principle (arising from the Tenth Amendment) that "Congress may not exercise power in a fashion that impairs the states' integrity or

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[25] *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870).

[26] Insofar as the *Lopez* case involves federal efforts to suppress crime and "domestic violence," Article IV, Section 4 of the Constitution is also implicated. The Founders clearly did not want the national government to intervene against "domestic violence" without a request from the affected state. *Notes of Debates in the Federal Convention of 1787, Reported by James Madison* (W.W. Norton & Co. ed., 1987) at 474-75.

their ability to function effectively in a federal system"[27] is more than merely academic in the *Guthrie* case. The State of Washington has an "unfair competition" statute whose prescriptive terms are identical to section one of the Sherman Act.[28] However, the Washington Legislature has, in contrast to its federal counterpart, elected not to punish violations as crimes. The felony conviction of a person who neither affects nor is in the flow of interstate commerce nullifies conscious choices made by the state legislature without advancing any necessary or proper federal interest.

Prompted, no doubt, by the federal courts' traditionally "highly deferential"[29] attitude toward Congress's descriptions of its own power, at least one commentator has concluded that "the limits on congressional power under the Commerce Clause . . . remain those of self restraint."[30]

That, clearly, was not the framers' intention. Hamilton wrote:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that

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[27] *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

[28] Wash. Rev. Code § 19.86.030 (1993).

[29] *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993).

[30] *The Constitution of the United States of America: Analysis and Interpretation*, (Johnny H. Killian ed., 1987) at ix.

> the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[31]

The Framers' dream of an individual, dynamic economy has been fulfilled to an extent which the Framers could never have imagined. No economic activity in this country can be identified which does not somehow touch the national economy. However, this has never meant (until *Guthrie*) that the full spectrum of economic relationships are subject to federal regulation under the commerce power. The Framers, after all, firmly intended to place limits on the national power. The Court should grant *certiorari* to address this issue and clearly resolve it.

D. THIS CASE GIVES THE COURT THE OPPORTUNITY TO CLARIFY AND REAFFIRM TRADITIONAL LIMITS ON THE "FLOW OF COMMERCE" TEST.

The Court also has the opportunity in this case to clearly state the rules that determine when the federal

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[31] *The Federalist Papers by Alexander Hamilton, James Madison, and John Jay,* (Garry Wills ed., 1982) at 395 (Federalist no. 78). The Anti-Federalists did not disagree that restraining the federal legislature was an appropriate role for the federal courts, but worried that the courts could not be counted on to fulfill it. *Brutus XI,* January 31, 1788, *reprinted in, The American Constitution: For and Against,* (J.R. Pole ed., 1987) at 61-63. *See also Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

courts possess subject matter jurisdiction in antitrust cases under an "in-flow" theory of interstate commerce. The Court should do so.

As the petition points out, the Ninth Circuit Court of Appeals misunderstood and consequently misapplied this Court's "in the flow of commerce" jurisdictional nexus test. The Ninth Circuit not only misread this Court's precedents in *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), but journeyed well beyond the limitations imposed on the Commerce Clause in this Court's much criticized opinion in *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991).

In this case, the Ninth Circuit held that even though Guthrie paid local people for local real estate with funds drawn from and deposited in local accounts, the acts of the trustees (who were independent actors) in later sending their own checks (drawn on accounts containing funds paid by Guthrie) across state lines meant that Guthrie's purchases were in the flow of interstate commerce.

The Ninth Circuit's conclusions amount to errors of law. The Ninth Circuit's approach vitiates the limit on the ability of the federal government to reach purely local, intrastate matters. The limit should be preserved, both because the Constitution requires it, and to avoid a lopsided allocation of federal-state responsibility for policing trade practices.

The law governing the reach of the federal government under the Commerce Clause has permitted increasing intrusion into intrastate affairs since the Sherman Act's

passage in 1890. However, this Court has never permitted the "flow of commerce" theory to reach so decidedly local an activity as shown on the facts of this case.

Initially, when Congress first passed the Sherman Act, the federal government could reach only those activities actually "in commerce."[32] Soon, however, the Court expanded the Act's jurisdictional reach, until the Court settled on the "flow of commerce" theory.[33] In *Swift*, the Court held that even though the price-fixing agreement occurred entirely within one state, the conspiracy targeted the "flow" of goods over state lines.[34]

The flow theory extends only so far, however. An item does not enter the "flow" until it embarks on its journey out of the state,[35] and ceases to be in commerce once the item arrived at its destination, commingles with other goods or property, and is held for local use.[36] Even in more recent times, the Court has reaffirmed the limits on the "flow of commerce" theory.[37]

Subsequent cases have expounded on the "flow" theory of interstate commerce. However, as stated in petitioner's brief, the cases have not been entirely clear. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court

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[32] *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

[33] *Swift & Co. v. United States*, 196 U.S. 375 (1905).

[34] *Id.*

[35] *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[36] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[37] *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974).

stated that under the effects test, the jurisdictional nexus could be shown even as to local transactions in real estate if the requisite "effect" on interstate commerce is proved.

> Given the *substantial volume* of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been *sufficiently affected.*[38]

Later, however, in *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), the Court stated that *Goldfarb* means the "flow of commerce" theory may be invoked where the purely local services at issue are "integral" to some other interstate transaction.[39]

This Court should clarify the rule. Regardless of how one reads *McClain* and *Goldfarb*, neither case supports the expansive reading given these cases by the Ninth Circuit.[40] As the Commerce Clause conveys limited power,

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[38] *Id.* at 785. (Emphasis added.)

[39] 444 U.S. at 244-45.

[40] *Goldfarb*, for example, involved a state-wide mandatory fee-setting scheme among attorneys for performing services that, by law, only attorneys could provide, and without which no one could buy property at all. *Goldfarb*, 421 U.S. at 775-80. The facts established that a certain volume of transactions originating outside the state necessarily could not have been completed without being affected by the restraint of trade. The attorney's services were thus deemed an "integral" part of the interstate transactions. Here, the sale of a single piece of real estate did not make Guthrie's activities "integral," nor was the money Guthrie gave the trustees deposited "in the flow" of commerce.

so the "flow of commerce" theory requires specific limitations on its application. Otherwise, as the petition demonstrates, any number of economically insubstantial transactions would fall under federal regulation, with the dual ill effects of trivializing federal power and upsetting state arrangements governing purely local concerns.

This Court remarked upon the difficulties associated with an expansive "flow of commerce" theory in the context of the Robinson-Patman Act. The Court stated:

> [Respondents] would then have us expand the concept of flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. . . . The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme. More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored to the economic realities of interstate market, the intensely practical concerns that underlie the purposes of the antitrust laws.[41]

If the flow of commerce theory in the *Guthrie* case was correctly applied in the courts below, few, if any local activities are exempt. This result does not comport with either constitutional principles or a reasonable allocation of responsibility for policing trade practices. The states have a far greater concern in regulating such wholly intrastate activities. And, federal enforcement would not

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[41] *Gulf Oil*, 419 U.S. at 198.

sensibly further "the intensely practical concerns that underlie the antitrust laws."[42]

IV.

CONCLUSION

In sum, the unprecedented expansion of Congressional power creates an immediate need for guidance in the lower courts. *United States v. Guthrie* gives this Court the prime opportunity to define the limits of federal commerce power under the flow of commerce theory and to communicate those limits to the district and circuit courts. For these reasons, NACDL respectfully urges this Court to grant *certiorari*.[43]

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[42] *Id.*

[43] Finally, the Court should not overlook the peculiar circumstances under which Guthrie was tried and convicted. Two lawyers reassured Guthrie before the fact that his conduct was lawful. Guthrie was forbidden to tell the jury this, or of his own ignorance that his conduct might run afoul of the Sherman Act, of which he was unaware.

Both the lower courts held that the government was not required to prove that petitioner Guthrie knew his conduct was likely to produce an unreasonable restraint on trade as required by *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-45 (1978). The lower courts held that Guthrie's good faith belief that he acted lawfully was irrelevant. Given the special importance of *mens rea*, in the context of statutes with an interstate commerce jurisdictional basis, the lower courts were surely wrong. *See Posters 'N' Things v. United States*, 114 S.Ct. 1747 (1994).

RESPECTFULLY SUBMITTED this 22nd day of July, 1994.

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1993 Resolution No. 4

Preserve the Historically Limited Role of the Federal Courts

Sponsored by

The Resolutions Subcommittee

WHEREAS, the Founders established two separate and independent judicial systems in this country, operating side-by-side; and

WHEREAS, until recently, the frequency and volume of conflicts arising from the joint and concurrent jurisdiction across the two systems has not had a disparate effect on either system; and

WHEREAS, recent actions by the Congress have significantly expanded federal jurisdiction into what had formerly been traditionally and exclusively state criminal law areas; and

WHEREAS, the increasing federalization of state law crimes poses a serious threat to the proper jurisdictional balance between the two court systems; and

WHEREAS, one serious side effect of this trend has been to dramatically increase the criminal dockets in the federal courts, reducing the ability to timely exercise their other important federal law functions in civil and noncriminal areas;

NOW, THEREFORE, BE IT RESOLVED THAT:

The Legislative and Executive Branches of the federal government should convene a national commission on the role of the federal judiciary, composed of members of

each branch of government along with highly respected state representatives, to:

1) Consider the appropriate role and function of the federal courts; and

2) Develop guidelines for the establishment of new federal crimes or causes of action based upon the enduring principles of a healthy federalism; and

3) Recommend such other measures to ensure the preservation of a proper balance between the state and federal court systems.

Statement of Reasons

The increasing federalization of traditional state law crimes by the Congress has a far-reaching impact on our conceptual ideal of the complementary roles of state and federal courts. Such actions by Congress evince a lack of respect and faith in the ability of the states to handle their affairs, and places an unreasonable burden upon the much smaller federal court system to handle expanding criminal dockets.

The Founders intentionally established dual judicial systems to preserve the independence of the states in a way that was compatible with the role of the national sovereign. This delicate balance is jeopardized by actions which tend to place greater reliance on one system over another for the enforcement of our criminal laws.

Other courts and circuits, the Sixth Circuit in particular, have passed resolutions urging the Congress to curtail the passage of legislation that federalizes state law and

impairs the jurisdictional balance between the state and federal courts.

This resolution urges the Congress and the Executive Branch, before proceeding further down the path of federalization, to create a high level national commission composed of members of all three branches of government and representative of the states – governors or former governors, law enforcement personnel, judges, respected academics – to carefully examine the relationships involved and to make principled recommendations to each branch for the best way to preserve the fundamental structure of our democracy.

Conference of Chief Justices

OFFICE OF GOVERNMENT RELATIONS

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President
Jean A. Turnage
Chief Justice
Supreme Court of Montana

February 28, 1994

Honorable Edward M. Kennedy
United States Senate
SR-315 Russell Senate Office Building
Washington, DC 20510-2101

Dear Senator Kennedy:

At its recent Midyear Meeting, the Conference of Chief Justices passed a resolution "Congressional Crime Legislation: Violent Crime Control and Law Enforcement Act of 1994." A copy of the Resolution is enclosed. I urge you and your colleagues to consider its content carefully.

The Conference of Chief Justices (CCJ) is composed of the highest judicial officers of the 56 State, Territorial and Commonwealth court systems and the District of Columbia. CCJ is to the State courts what the National Governors Association is to the State executive agencies.

In our Resolution, the Conference expresses strong support for the efforts of Congress to address the very serious problem of crime in our country. We believe those problems threaten the very fiber of society and require immediate action to assure the safety of our citizens and

their property as well as long-term action that addresses systemic crime problems.

However, the collective experience of 56 systems of criminal justice demonstrates that Federal efforts are more effective when they complement rather than supplant State law and procedure. Crime is pervasive across the nation and, in more than 95 percent of all the cases, investigation, prosecution and adjudication is and must be accomplished by State law enforcement and State courts. The concept of Federalism, as expressed in the Tenth Amendment of the United States Constitution, whereby the Federal government concentrates on those criminal enterprises that are beyond the scope and reach of State capabilities and supports enforcement and punishment by the states at the local level, provides for the most effective and efficient use of Federal and State resources.

Many of the provisions of the Senate version of H.R. 3355 are not consistent with these legal principles and our practical experience. We urge the members of the Senate and House to reconsider the bills before them, and draft legislation founded on the principles set forth in the resolution of the Conference of Chief Justices, which will, in our view, most effectively address the difficult problems of crime in each community across the country as well as the country as a whole.

If you have questions regarding the CCJ Resolution, or wish further elaboration on the position, I would urge you to contact the Chair of our Committee on State-Federal Relations, Chief Justice Lyle Reid of Tennessee

(615/741-2484), or our Washington Liaison, Thomas Henderson (703/841-0200).

Sincerely,

/s/ Jean A. Turnage
Chief Justice Jean A. Turnage

Encl.

Federalization of State Prosecutions
Position of the Judicial Conference
of the United States

The Judicial Conference of the United States opposes legislation adopted by the Senate which would expand federal criminal law jurisdiction to encompass homicides and other violent state felonies if firearms are involved. Such expansion of federal jurisdiction would be inconsistent with long-accepted concepts of federalism, and would ignore the boundaries between appropriate state and federal action.

The addition to federal jurisdiction of virtually any crime committed with a firearm that has crossed a state line will swamp the federal courts with routine cases that states are better equipped to handle, and will weaken the ability of the federal courts effectively to deal with difficult criminal cases that present uniquely federal issues.

Not only will bona fide federal criminal prosecutions suffer if the Senate's expansive firearms provisions are adopted, but federal courts, overburdened by criminal cases, will be unable to carry out their vital responsibilities to provide timely forums for civil cases.

Question:

R08 Which level of government do you think has too much power today – federal, state, or local?

Responses:	
1. Federal	61%
2. State	9
3. Local	4
4. All of them (vol.)	8
5. None of them (vol.)	6
6. Don't know/No answer	12

Survey Organization:	Gallup Organization
Research Sponsor:	Advisory Commission on Intergovernmental Relations
Population:	National adult
Population Size:	1029
Interview method:	Personal
Beginning date:	JUN 10, 1989 Ending date: JUN 18, 1989
Source Document:	Changing Public Attitudes On Governments & Taxes
Date or Source Document:	JUN 1989
Subject:	GOVERNMENT FEDERALISM POWER

FULL QUESTION ID: USGALLUP.89ACIR.R08

Question:

R36 Think about relations between the states and the federal government. Does the federal government have too much power, do the state governments have too much power, or is the balance about right?

Responses:

Federal too much	39%
State too much	5
About right	47
No opinion	9

Survey Organization:	CBS News/New York Times
Population:	National adult
Population Size:	1254
Interview method:	Telephone
Beginning date:	MAY 11, 1987 Ending date: MAY 14, 1987
Source Document:	CBS News/New York Times
Date of Source Document:	MAY 25, 1987
Subject:	FEDERALISM GOVERNMENT

FULL QUESTION ID: USCBSNYT.052587.R36

Conference of Chief Justices

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President
Jean A. Turnage
Chief Justice
Supreme Court of Montana

RESOLUTION IX

Congressional Crime Legislation
Violent Crime Control and
Law Enforcement Act of 1994

WHEREAS, the Senate version of H.R. 3355, which has passed the Senate and has been sent to conference, would result in the indiscriminate federalization of crimes, the needless disruption of effective state and local enforcement efforts, and the inefficient use of the special but limited resources of the federal courts; and

WHEREAS, state courts and prosecutorial agencies are responsible for more than 95% of all criminal prosecutions in the United States; and

WHEREAS, by imposing on States federal standards and programs, the proposed legislation would curtail the selective use of pretrial detention, sentencing and parole; and would invalidate principles of substantive state law – areas in which States have a constitutional responsibility under the principles of federalism

and a long and proven history of successful initiatives; and

WHEREAS, in addition to contravening principles of federalism, this legislation is further flawed because it: 1) assumes without foundation that states have been unresponsive and ineffective in addressing crime; 2) fails to enact plausible solutions for violence, drugs, weapons or gangs; 3) creates an illusion by enacting new criminal law without providing the resources required for the federal government to enforce that law, and 4) disrupts funding of state criminal processes by favoring police and corrections with federal funds while disregarding the need this creates for commensurate resources for courts, prosecutors and defense counsel; and

WHEREAS, the command of the 10th Amendment encourages each state to serve as a laboratory for development of legal remedies and principles in criminal and civil law, without intrusion of federal authority.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices:

- strongly believes that the problems of crime in our nation must be addressed in a meaningful way to provide resources and reinforcement for the efforts of state judicial, legislative and executive leaders to address the problems of crime in their jurisdictions;

- strongly opposes federal action which, contrary to the principles of federalism and historical experience, would have the pernicious effect of federalizing State criminal law and procedure; and

- strongly opposes provisions of the proposed legislation which would require that the limited resources of the federal courts be expended in the prosecution and trial of ordinary street crimes, to the exclusion of interstate crime syndicates, corruption in public office, the vindication of individual constitutional rights and other traditional federal issues.

Adopted by the Conference of Chief Justices at the Seventeenth Midyear Meeting in Sea Island, Georgia, on February 10, 1994.

NATIONAL GOVERNORS ASSOCIATION

Howard Dean, M.D.
Governor of Vermont
Chair

Tommy G. Thompson
Governor of Wisconsin
Vice Chair

Raymond C. Scheppach
Executive Director

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[LOGO]

HR-25. FEDERALIZATION OF CRIME CONTROL

EACH LEVEL OF GOVERNMENT – FEDERAL, STATE, AND LOCAL – PLAYS A ROLE IN FIGHTING CRIMINAL ACTIVITY. CONTROLLING CRIME, PARTICULARLY VIOLENT CRIME, WILL REQUIRE STRONG AND EFFECTIVE ACTION AND COOPERATION BY FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT OFFICIALS.

TRADITIONALLY, STATE AND LOCAL GOVERNMENTS ARE ON THE FRONT LINES OF CRIME CONTROL. VIRTUALLY ALL PLANNING OF CRIMINAL JUSTICE ACTIVITIES, AS WELL AS THE PROSECUTION AND INCARCERATION OF VIOLENT CRIMINALS, OCCURS AT THE STATE LEVEL. THE FEDERAL GOVERNMENT HAS SERVED LARGELY IN A SUPPORTING ROLE IN THIS EFFORT, PROVIDING RESEARCH, DATA, ANALYSIS, MATERIAL, AND HUMAN RESOURCE ASSISTANCE FOR STATE AND LOCAL GOVERNMENTS.

IN RECENT YEARS, THE FEDERAL GOVERNMENT HAS CREATED OR HAS CONSIDERED CREATING PENALTIES FOR A WIDE RANGE OF CRIMES AND ACTIVITIES THAT ARE TYPICALLY PROSECUTED AT THE STATE LEVEL. THE NATION'S GOVERNORS ARE CONCERNED THAT SOME ATTEMPTS TO EXPAND FEDERAL CRIMINAL LAW INTO TRADITIONAL STATE FUNCTIONS WOULD HAVE LITTLE EFFECT IN ELIMINATING CRIME BUT COULD UNDERMINE STATE AND LOCAL ANTICRIME EFFORTS. FURTHER, THE GOVERNORS ARE CONCERNED THAT FEDERAL CONCURRENT JURISDICTION IN CRIMINAL JUSTICE EFFORTS CAN BE USED BY THE FEDERAL GOVERNMENT AS A MEANS TO IMPOSE UNDUE MANDATES ON STATE AND LOCAL GOVERNMENTS THAT WORK TO DISRUPT STATE AND LOCAL CRIME FIGHTING EFFORTS.

THE NATION'S GOVERNORS RECOGNIZE AND WELCOME THE FEDERAL GOVERNMENTS UNIQUE CAPABILITIES AND RESOURCES IN THE FIGHT AGAINST CRIME. ULTIMATELY, SUCCESS CANNOT BE ACHIEVED WITHOUT FEDERAL ASSISTANCE. THEREFORE, AS THE FEDERAL GOVERNMENT CONTINUES TO CONSIDER HOW IT CAN BEST WORK TO ELIMINATE CRIME, THE GOVERNORS URGE LEGISLATORS TO PURSUE POLICIES THAT RECOGNIZE RATHER THAN ERODE THE STATES' ROLE AS THE CHIEF PLANNERS AND ADMINISTRATORS OF CRIMINAL JUSTICE PROGRAMS.